LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 5 1970
JOHN F. DAVIS, CLERK

No. 1030

In the Supreme Court of the United States

OCTOBER TERM, 1969

HUGH H. WILSON CORPORATION, PETITIONER

v.

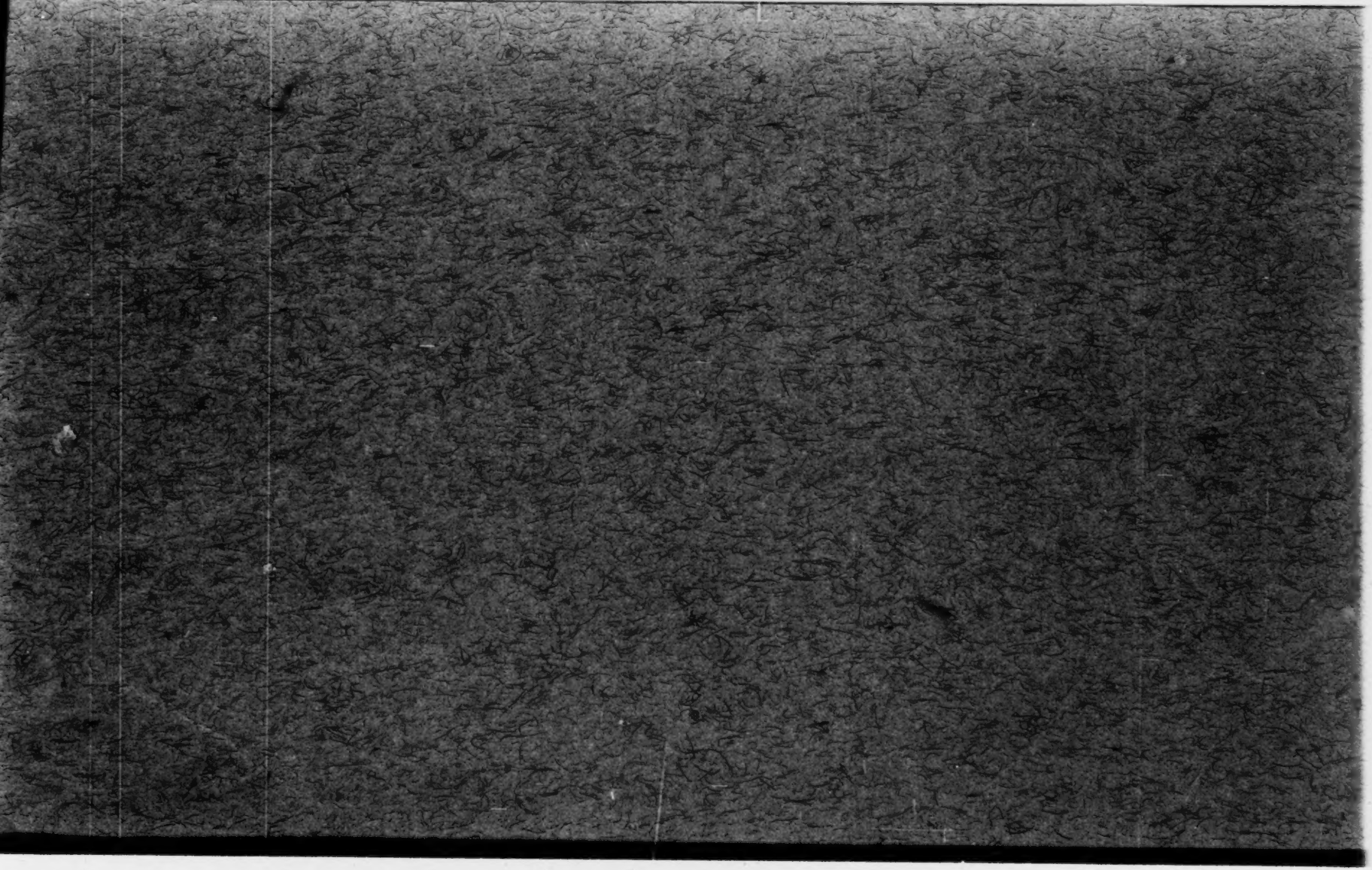
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COMER,
Assistant General Counsel,
ELLIOTT MOORE,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.



In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1030

HUGH H. WILSON CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–25a) is reported at 414 F. 2d 1345. The Board's decision and order (Pet App. 27a–56a) are reported at 171 NLRB No. 145.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1969, and a petition for rehearing was denied on October 7, 1969 (Pet. 2; Pet. App. 26a). The petition for a writ of certiorari was filed on January 3, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

375 866 70

QUESTION PRESENTED

Whether substantial evidence supports the finding of the National Labor Relations Board that two employees were discharged for engaging in concerted activity protected by Section 7 of the National Labor Relations Act.

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. 2–3 of the petition.

STATEMENT

For several years, petitioner Company has maintained a profit-sharing plan in which all employees with more than one year's service are eligible to participate (A. 7; 26, 37, 39, 65, 66).[1] In 1967, the Company decided to invest profits from the previous year in new molds and other equipment, rather than contribute to the plan (A. 7; 115–116). This decision was reflected in the profit-sharing statements distributed to participating employees by their foremen on Friday, June 16, 1967 (A. 7, 10, 12; 26, 37, 66, 162–163). On receiving the statements, several employees complained. Employee William Moll told his foreman, Bruce Minnier, "I could work 'til I'm 65 and wouldn't have nothing to retire on" (A. 7; 26, 66–67, 164). Edwin Gibson also announced his dissatisfaction to Foreman James Howard in the presence of other employees in the machine shop (A. 11; 147–148, 152).

[1] "A." refers to the Appendix to the briefs in the court below.

At a meeting held that afternoon to discuss the Company's action, Foreman Minnier explained to the employees that the Company could not continue its contribution to the profit-sharing plan because it was entering a new market, which in turn would provide the employees with greater job security (A. 12; 116, 164–165). Employee William Yokheimer asked why the Company "could not have invested none of the booklet on the profit sharing plan" (A. 8, 12; 71, 165), and employee Gibson added that if the plan was "on the level" each employee "would * * * have a copy of what the profit-sharing was to do" (A. 8; 72–73). Another employee, Russell Haas, asked why the Company could not have invested some of the profits "but still have saved some for the profit-sharing plan so that each of the employees would get a little and be contented" (A. 8, 12; 71, 165). Employee Moll made Haas' proposal specific, suggesting, "[m]aybe you can invest 85 percent and save another 15 percent for the employees in the profit sharing plan" (A. 8; 72). Minnier did not answer this proposal, but summed up his position with the statement (A. 8; 72): "Well, I'm still satisfied; I still have faith in the Company." Moll told Minnier that the Company "was no damn good" (A. 12, 16; 166).

Following the meeting, employees Moll and Gibson met together to discuss the inadequacies of the profit-sharing plan and concluded that it was "kind of a dirty deal" because the employees "should have gotten more" (A. 8; 74–75). Moll also discussed the plan

with employees Haas and Maurer, both of whom expressed dissatisfaction with the Company's action (A. 8; 73–77). The remainder of the day, employees, on encountering each other in the shop, remarked "have faith," a reference to Minnier's closing remarks (A. 8, 17; 92). The following workday, employee Yokheimer brought in a newspaper clipping of the Company's advertisement for a secretary, which listed among employee benefits an "outstanding profit-sharing plan" (A. 8, 10; 76, 113, 28). Yokheimer gave the clipping to Moll, who showed it to Foreman Minnier, commenting, "I'm going to put this with my profit-sharing statement for when I get in the office" (A. 8; 77, 90, 170).

Meanwhile, Minnier had informed Plant Manager Bidelspach that the men at the meeting had expressed a "general dissatisfaction with the Company's failure to contribute to the plan" and "that Moll and Gibson made some derogatory remarks about the company" (A. 10, 13; 116–117). Bidelspach commented: "It takes a lot of guts for someone to say 'I don't want the company using my money to buy new equipment'" (A. 10; 117). Bidelspach then met with Company President Mary Pich, who, after consulting with counsel, decided to discharge both Moll and Gibson. That decision was announced on July 19. (A. 10–11; 118, 134–135, 170–171, 182.) After Moll and Gibson were discharged, Bidelspach called a meeting to tell the employees that Moll and Gibson had been discharged because of their poor attitude and work

performance, and not because of their criticism of the profit-sharing plan (A. 10; 119–120).

The Board found that Moll and Gibson were discharged because of "the part [they] played in the protest and dissatisfaction with the profit-sharing distribution," that such activity "constituted concerted activity * * * protected by the Act," and that the Company thus violated Section 8(a)(1) of the Act (Pet. 46a–48a). The Board ordered the Company, *inter alia*, to reinstate Moll and to make him and the estate of Gibson (who had meanwhile died) whole for any lost earnings (Pet. 54a). The court of appeals (with one judge dissenting) sustained the Board's findings and conclusions, and enforced its order (Pet. 1a–25a).

ARGUMENT

The question which the petition seeks to raise (Pet. 2)—whether individual griping, unrelated to group action, constitutes concerted activity within Section 7 of the Act—is not presented here. The Board found that the activity of Moll and Gibson constituted group or representative action (Pet. 47a), and the court of appeals agreed, holding (Pet. 17a) that the "totality" of the conduct by Moll and Gibson reflected "a general dissatisfaction which manifested itself, however inartfully, in the desire to do something about the disappointing profit-sharing contribution * * *." Accepting this finding,[2] the decision below is consistent

[2] Judge Kalodner dissented on the ground (Pet. 24a) that the record did not support this finding.

with the decisions of other courts of appeals.[3] Petitioner's challenge to the decision below thus raises only an evidentiary issue which does not warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

Moreover, the evidence amply supports the Board's finding that Moll and Gibson were spearheading a group action. Although Moll and Gibson were the most outspoken critics, dissatisfaction over the Company's failure to contribute any profits was general among the employees. At the meeting called to discuss the Company's action, several employees proposed ways of resolving the grievance; Moll and Gibson then took up the points the others had raised, adding respectively a more specific proposal and a sharper note of criticism. After the meeting, the employees continued their discussion of the issue, and the following workday employee Yokheimer brought in a newspaper clipping relevant thereto. Shortly after Moll advised his foreman that he was going to use the clipping when he went to the office, he and Gibson were discharged. (*Supra*, pp. 2–4.)

---

[3] *Southern Oxygen Company* v. *National Labor Relations Board*, 213 F. 2d 738, 741–742 (C.A. 4); *Owens-Corning Fiberglas Corp.* v. *National Labor Relations Board*, 407 F. 2d 1357, 1365 (C.A. 4); *National Labor Relations Board* v. *Schwartz*, 146 F. 2d 773, 774 (C.A. 5); *National Labor Relations Board* v. *Halsey W. Taylor Co.*, 342 F. 2d 406, 408 (C.A. 6); *National Labor Relations Board* v. *Phoenix Mutual Life Insurance Co.*, 167 F. 2d 983, 988 (C.A. 7); *Signal Oil and Gas Company* v. *National Labor Relations Board*, 390 F. 2d 338, 343 (C.A. 9); *Salt River Valley Water Users' Ass'n* v. *National Labor Relations Board*, 206 F. 2d 325 (C.A. 9); *International Ladies' Garment Workers' Union* v. *National Labor Relations Board*, 299 F. 2d 114, 115 (C.A.D.C.).

The cases relied on by petitioner (Pet. 7–8) are factually distinguishable. In *Indiana Gear Works* v. *National Labor Relations Board*, 371 F. 2d 273, 276 (C.A. 7), and *American Art Clay Company* v. *National Labor Relations Board*, 328 F. 2d 88, 89 (C.A. 7), there was, unlike here, an absence of "any conversation [by the employees] among themselves concerning either a request for higher wages or improved working conditions" (371 F. 2d at 277). In *National Labor Relations Board* v. *Office Towel Supply Co.*, 201 F. 2d 838, 841 (C.A. 2), the court found no evidence that the employer knew that the employee activity was concerted; here the complaints not only were discussed among the employees, but management was well aware of this fact.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel.
NORTON J. COME,
Assistant General Counsel,
ELLIOTT MOORE,
Attorney,
National Labor Relations Board.
FEBRUARY 1970.

U.S. GOVERNMENT PRINTING OFFICE 1970